

# Traditional Cultural Properties vs. Traditional Cultural Resource Management

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Most archeological investigations in the United States today are undertaken to comply with the National Historic Preservation Act (NHPA). Actions by Congress and the Executive branch during the 1990s increasingly have prescribed how archeologists pursue their profession. Archeology still is a science, but its pursuit today is dictated more by non-scientific interests. Diverse public interests are now directly involved in the decision-making process for archeological sites, and some of these interests, specifically Native Americans, have standing equal to or greater than that of archeologists. Consequently, what is considered acceptable management has changed. Archeologists, particularly those in the federal sector, are becoming involved in activities traditionally outside the realm of their discipline. These changes primarily are due to concerns and interests of the Native American community with the biggest impact being at the “local” level where involvement affects the federal stewardship of Native American cultural resources.

Two aspects of the activities by Congress and the Executive branch are addressed:

- the impacts of these activities on archeologists and Native Americans, and
- Indian trust assets as a cultural resource management issue.

Although these issues most directly affect archeologists involved in cultural resource management, they extend to any archeologist who works on federal lands or with federal funds. Many archeologists view these topics with trepidation, given the animosity that often exists between Native Americans and archeologists. However, the course is set and the discipline, by necessity, will continue to change in this era of tribal self-determination and self-governance. Over time, though, these issues have the potential to rejuvenate and expand the discipline.

## *Federal Legislation*

The Native American Graves Protection and Repatriation Act (NAGPRA), the 1992 amendments to NHPA, and amendments to P.L. 93-638, the Indian Self-Determination and Education Assistance Act, provide for increased involvement of Native Americans in archeology and historic preservation. NAGPRA addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. These parties are to be consulted when such items are inadvertently discovered or intentionally excavated on federal or tribal lands. NAGPRA recognizes Native American “ownership” of these items, a precedent first established by the Archaeological Resources Protection Act which states that archeological resources on lands owned by a tribe or individual Indian landowner belong to that tribe or landowner.

The NHPA amendments mandate tribal participation in the Section 106 process. A federal agency must consult with the tribal government when its activities occur on a reservation. Agencies also must consult with a tribe if an activity will affect a historic property to which the tribe attaches cultural or historic importance. More important, tribal historic preservation programs have the same legal status as state historic preservation programs. These stipulations are an acknowledgment that tribal sovereignty extends into the arena of cultural resource management and, therefore, are an extension of the government-to-government relationship between tribes and the federal government.

The NHPA amendments also specify that “properties of traditional religious and cultural importance to Native Americans” qualify for inclusion in the National Register of Historic Places. To a certain extent, this specification addresses the inability of the American Indian

Religious Freedom Act (AIRFA) to protect Native American sacred sites. This designation also expands the definition of “cultural resource” to include sites that may lack material remains.

The purpose of P.L. 93-638 is to promote tribal sovereignty by allowing tribes to contract federal programs and projects available to Native Americans. The 1987 amendments expanded the act to encompass all agencies within the Departments of Health and Human Services and Interior. These agencies cannot refuse to contract with tribes except under five specific criteria. Further, the agency must assume that the tribe has the capabilities to perform the work for which it is contracting. The tribe determines the activities that it will perform and those that the agency will retain. The only functions a tribe cannot contract are the agency’s trust responsibilities although all the activities associated with that responsibility are contractible. Among the activities a tribe can include are the associated archeological activities, although the agency retains the responsibility for compliance and must ensure that any archeological activities conform with agency and federal standards. The agency’s role is to provide technical assistance, not only during the performance of the contract but also during proposal development.

In the Bureau of Reclamation (Reclamation), Dakotas Area Office (DKAO), all contracted Indian projects include cultural resource activities. DKAO archeologists provide technical assistance to the tribes in developing their cultural resource capabilities and undertaking compliance activities.

#### ***Executive Memoranda and Orders***

Several executive actions have impacted, or have the potential to impact, how archeological activities are conducted on federal lands or with federal funds. In 1991, President Bush issued a statement on American Indian policy that reaffirmed the government-to-government relationship between federal and tribal governments. In 1994, President Clinton signed a similar memorandum requiring Executive branch departments, agencies, and bureaus to respect this government-to-government relationship when involving Indian tribes. These actions specify that consultation is the primary component of this relationship.

In 1996, President Clinton signed Executive Order 13007, Accommodation of Sacred Sites, which mandates that federal agencies consult with tribes to identify sacred sites on public lands and

to consider the impacts of federal actions on these sites. “Sacred sites” are defined as

... any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance ....

This definition parallels that for “properties of traditional religious and cultural importance to Native Americans” in NHPA.

#### ***Impacts***

The impacts of these federal actions on cultural resource management are threefold:

- Native Americans are now integral players in cultural resource management;
- the universe of what constitutes a cultural resource has expanded; and
- ownership of data and resources is an issue.

The first impact reflects that many archeological resources constitute the material remains of Native American history. Consequently, it is only logical that Native Americans should be actively involved in the management of these resources. The federal legislation increases the ability of tribes to govern their affairs as sovereign nations.

The second impact reflects that Native Americans define cultural resources more broadly than do most archeologists. This broader view is exemplified by the elevated status now given to “traditional cultural properties” (TCPs), or sacred sites. Traditionally, cultural resources were defined by the presence of physical remains—objects, features, building, structures, or architecture. In contrast, traditional cultural properties often are defined by “place” or “setting” (e.g., the Black Hills) and material remains do not necessarily need be present. Archeologists and cultural resource managers can no longer rely on material remains alone to identify such historic properties. Tribal elders and traditional leaders are the ones with knowledge of such sites and must be consulted. But this presents a problem for archeologists and cultural resource managers because these elders often do not want to divulge information about these sites to outsiders. They are skeptical, at best, about working with archeologists and question their motives. More importantly, they consider such information private and to disclose it, especially to a “wasichu” archeologist, would be sacrilegious.

The last impact concerns the “ownership” of data and resources. In the Northern Plains, this

issue is increasingly being raised as tribes become more sophisticated about and more actively involved in cultural resource management. Many believe that not only the resources but any information about them, including published reports, belong to the tribe. These data represent intellectual property rights. These tribes believe that they have the sovereign right to determine who gets access to the data, including the federal agencies that have paid for the collection of this information. It is an issue that, sooner or later, federal agencies are going to have to address.

Archeologists are no longer the sole proprietors and interpreters of pre-European history. Compliance with federal legislation rests with those archeologists and cultural resource managers in the federal sector. However, this legislation potentially affects any archeologist working on federal or tribal lands, working with federal collections, working with tribes, or conducting investigations with federal funds or under a federal permit.

#### ***Indian Trust Assets***

The latest “hot topic” concerns Indian trust assets (ITAs). ITAs are defined in the implementing regulations for P.L. 93-638 as:

... an interest in land, water, minerals, funds or other assets or property which is held by the United States in trust for an Indian tribe or an individual Indian or which is held by an Indian tribe or Indian subject to a restriction on alienation imposed by the United States. (25 CFR Part 900.6)

A spin-off of the executive orders cited above is that agencies must assess the impacts of their activities on these trust assets. Reclamation, as with many other agencies, assesses these impacts through the National Environmental Policy Act process. Because of the involvement of the cultural resource staff with Native American cultural resources and history, they are often assigned responsibility for this assessment. Unfortunately, these assets do not constitute cultural resources as traditionally defined so they cannot be identified through traditional means. The problem faced by many cultural resource staff is how to identify them.

To assess ITAs and the government’s responsibility with respect to them, it is necessary to understand the trust relationship between tribes and the federal government. This relationship has been defined through treaties, statutes, executive orders, and legal decisions and is based on the concept of tribes as sovereign governments. When

a tribe “agreed” to give up or “cede” lands, rights, or resources to the government through a treaty, the government agreed to provide certain goods, services, and protections. Ostensibly to protect tribal interests, the government placed in trust, or “reserved,” the lands, resources, and rights that a tribe did not give up. In setting aside these assets, the government assumed a fiduciary responsibility to protect these assets, thereby cementing the “trust relationship.” These lands, resources, and rights comprise ITAs.

For projects within or adjacent to a reservation, ITA assessment is straightforward and is accomplished through consultations with the appropriate tribe and the Bureau of Indian Affairs. The problem is with projects on lands ceded by treaty or executive order. In the DKAO, Angostura, Pactola, Deerfield, and Keyhole reservoirs exemplify this situation. Although removed from the modern reservations, these reservoirs are within lands set aside for the Great Sioux Nation in the Ft. Laramie treaties. The Sioux tribes no longer have direct control of these lands, but the tribes may still retain rights of access for hunting, fishing, or gathering, or rights to the waters and these rights may qualify as ITAs. To determine the status of these rights accurately necessitates a review of the relevant treaties.

The DKAO has undertaken a project to address this issue. The project involves a review of the treaties and executive orders associated with the tribes that either currently reside in or historically occupied the areas served by the office. The purpose is to identify the geographical area covered by each treaty or executive order and any reserved rights that the associated tribe may have retained with respect to this area. Primary sources include Kappler,<sup>1</sup> Royce,<sup>2</sup> the Indian Claims Commission,<sup>3</sup> and the U.S. House of Representatives and Senate library web sites. The product will be a management tool for the DKAO to identify ITAs that may be affected during the planning stages of a project or activity.

#### ***It Is a Different World Out There Today!***

Today, the activities of archeologists increasingly are determined by legislation rather than by science. While these activities are becoming more circumscribed, the involvement of Native Americans in the management of archeological resources is expanding. Many archeologists, in their role as cultural resource manager, now find themselves more actively involved in Native American issues and these often extend beyond

cultural resources. To a large extent, this new role is a natural outgrowth of the historic association that archeology has had with Native American cultural resources and history.

TCPs and ITAs are outside the boundaries of the items traditionally considered under archeology. However, these classes of resources should be studied by archeologists if they are truly interested in all aspects of human prehistory/history. In a theoretical sense, the identification and evaluation of TCPs, even if they lack material remains, “round out” the archeological record because the use of many of these “sites” extend back in time. Such sites represent another important and integral aspect of the use of the landscape.

The era of Native American archeology with its different concepts of cultural resources is here. For the health and growth of the discipline archeologists need to embrace it as it offers the opportunity to overcome the animosity between Native Americans and archeologists. Archeologists may find their professional training as anthropologists helpful in communicating with Native Americans to find common ground. After all, both groups—

archeologists and Native Americans—share a common interest—the preservation of Native American heritage. The two simply have different approaches and interpretations.

## Notes

- <sup>1</sup> Kappler, Charles J., *Indian Affairs: Laws and Treaties*, (Washington, D.C.: U.S. Government Printing Office, compiled 1904-1941, Reprinted: AMS Press, New York, 1971).
- <sup>2</sup> Royce, Charles C., compiler, *Indian Land Cessions in the United States*, 18th Annual Report of the Bureau of American Ethnology, to the Secretary of the Smithsonian Institution, 1896-97, printed in Washington, by the Government Printing Office, 1899.
- <sup>3</sup> U.S. Geological Survey, “Indian Land Areas Judicially Established 1978.”

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## Native American Graves Protection and Repatriation Act Activities

In response to the Native American Graves Protection and Repatriation Act (NAGPRA), the Bureau of Reclamation (Reclamation) has achieved the following:

- Hired a NAGPRA Coordinator to serve as a clearing house of information for staff administering NAGPRA in the field.
- Completed a Summary Report which included information regarding eighteen unassociated funerary objects, one sacred object, and one object of cultural patrimony. The Summary Report was provided to 133 Indian tribes and the Departmental Consulting Archeologist (DCA).
- In consultation with potentially culturally affiliated Indian tribes, inventoried approximately 1,300 human remains and nearly 60,000 associated funerary objects and submitted Inventory Reports to tribes and the DCA. Currently, only 4% of the inventoried items have been assigned a cultural affiliation. However, responsible offices are actively adjusting their inventories, including assigning cultural affiliation, as new evidence is made available.
- Published in the *Federal Register* one notice of inventory completion with a second notice pending.
- Exploring the possibility of the repatriation of culturally unidentifiable human remains through the NAGPRA Review Committee for collections from Kansas and North Dakota.
- Consulting with Indian tribes regarding planned excavations and inadvertent discoveries on Reclamation lands. All Native American human remains and cultural items will, upon request, undergo disposition according to NAGPRA.
- Participated in two dispositions that resulted in reburials when human remains and associated funerary objects were inadvertent discoveries on Reclamation lands.
- Arranged for 83% of its cultural resources staff to take the three-day University of Nevada, Reno NAGPRA training course in November 1999.
- Placed Reclamation's NAGPRA activities and contact information on the world wide web at <<http://www.usbr.gov/nagpra/>> to allow tribes, other federal agencies, and museums better access to Reclamation's compliance efforts.

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